

REPORT TO CONGRESS

SMALL BUSINESS PAPERWORK RELIEF ACT

**FEDERAL TRADE COMMISSION
DECEMBER 2004**

EXECUTIVE SUMMARY

The Federal Trade Commission (“Commission” or “FTC”) is submitting this report to Congress and the Small Business and Agriculture Regulatory Enforcement Ombudsman pursuant to Section 4 of the Small Business Paperwork Relief Act of 2002 (“SBPRA”).¹ That provision of SBPRA builds on requirements of the related Small Business Regulatory Enforcement Fairness Act (“SBREFA”),² which mandates that federal agencies establish small business civil penalty leniency programs. This report discusses the FTC’s Fiscal Year 2004 enforcement actions in which a civil penalty was assessed, the number of such actions against small entities, the number of those actions in which the civil penalty was reduced or waived, and the total monetary amount of reductions or waivers. As provided in SBPRA, the report also includes the agency’s definitions of “small entity,” “enforcement actions,” and “reduction or waiver.”

The Commission has a wide range of remedy options in its enforcement actions. These

penalties in any of the 12 enforcement actions.

The total amount of civil penalties obtained by the Commission in the 12 cases was \$5,875,135. The total amount of reduction (for 10 cases involving large businesses and one case involving a small business) was \$7,928,765. Accordingly, the grand total of reduced and waived civil penalties was \$7,928,765.

These penalties were reduced for a variety of reasons. In some instances, during negotiations, companies produced additional information, such as evidence that there were fewer violations than originally estimated, or that the violations were less egregious than previously thought. In other instances, the reductions reflect the normal give and take of negotiations, and each party's desire to avoid unnecessary costs of litigation. In all instances, the Commission rigorously reviews each penalty and supporting rationale to ensure that the penalty is appropriate and will promote deterrence without creating an undue burden. When necessary, the Commission will request that staff increase a civil penalty amount if the reduced amount does not appear to be sufficient to deter unlawful conduct.

INTRODUCTION

The Commission has prepared this report pursuant to Section 4 of the SBPRA. This provision of SBPRA builds on the requirements of the related SBREFA. That statute required agencies to establish a small business compliance assistance program and a small business civil penalty leniency program and to report on those programs. Section 4 of SBPRA requires that each agency file a report for fiscal years 2003 and 2004, providing specific information on the number of enforcement actions in which a civil penalty is assessed, the number of enforcement actions in which a civil penalty is assessed against a small entity, the number of enforcement actions in which the civil penalty is reduced or waived, and the total monetary amount of the reductions or waivers. The reports are to include the agency's definitions, for purposes of the report, of the terms "enforcement actions," "reduction or waiver," and "small entity."

BACKGROUND

The Federal Trade Commission is a small agency³ with a big mission: to maintain a free and fair marketplace for both business and consumers. The Commission enforces the FTC Act, 15 U.S.C. § 41 *et seq.*, and has enforcement or other responsibilities under more than 50 additional statutes. The Commission enforces nearly 30 rules promulgated pursuant to specific statutory directive and 13 trade regulation rules promulgated under the rulemaking authority of the FTC Act. The Commission has always been aware of and attentive to the special needs and interests of small businesses subject to its jurisdiction.

The Commission has a wide range of remedies available to obtain compliance with the laws and regulations it enforces. Remedies for certain statutory and regulatory requirements

The Commission's Civil Penalty Leniency Program

Pursuant to SBREFA, in 1997 the Commission issued policy statements describing how it considers small business needs in two areas: (1) providing compliance assistance, and (2) determining appropriate civil penalty amounts when bringing enforcement actions.⁵ The Commission's Small Business Compliance Assistance Policy Statement describes various forms of assistance available to small businesses to help them understand and comply with obligations imposed by the statutes and rules enforced by the Commission. The Commission's Civil Penalty Leniency Policy Statement discusses mitigating factors the Commission considers when small

rules,⁷ if the defendant had actual knowledge (or knowledge fairly implied on the basis of objective circumstances) that its acts were unfair or deceptive and prohibited by the rule. In determining the appropriate amount of a penalty, the courts are directed by Section 5(m)(1)(C), 15 U.S.C. § 45(m)(1)(C), to take into account the degree of culpability; any history of prior such conduct; ability to pay; effect on ability to continue to do business; and such other matters as

with the litigation risks and penalties imposed in similar cases.

Scope of the Commission's Civil Penalty Leniency Policy

In light of the Commission's past experience, as well as the factors suggested in SBREFA itself, the Commission adopted the following policy for reducing, or in appropriate circumstances waiving, civil penalties for violations of a statutory or regulatory requirement by a small entity:

When the Commission identifies a small entity as failing to comply with a statutory or regulatory requirement within the Commission's jurisdiction, the Commission will consider the propriety of penalty waiver or reduction. The following factors will weigh in favor of leniency:

1. The small entity reported the violation to the Commission promptly after discovering it.

and, depending upon the particular circumstances, some factors may be weighed more heavily than others. Also, any other factors relevant in particular circumstances will be considered, as appropriate.

The above criteria include most of the factors suggested in SBREFA. The one suggested factor that the Commission did not include is one that would limit the penalty reduction policy or program to violations discovered by the small entity through participation in an agency-run or state-run compliance assistance or audit program. The Commission does not have formal compliance assistance or audit programs. Given the variety and scope of the rules and statutes that the Commission enforces, imposing a parallel requirement, such as a self-auditing program, would unnecessarily restrict the availability of penalty waivers or reductions.

In addition, the Commission expanded somewhat the scope of two of the factors suggested in SBREFA. First, SBREFA suggests excluding entities that have been subject to multiple enforcement actions by the agency. The Commission broadened this category to include entities that have been subject to actions for the same or similar conduct by other federal agencies or state or local agencies. The law violations prosecuted by the Commission are frequently very similar to violations prosecuted by other federal, state, and local law enforcement agencies. It is therefore appropriate, in considering whether to exclude entities from lenient treatment, to consider whether similar conduct has been subject to enforcement efforts by other authorities.

Second, SBREFA also suggests excluding violations that pose serious health, safety, or environmental threats. In addition to such risks, the Commission also considers serious economic injury, as that form of injury is the type most often encountered in Commission cases, and in many instances may cause as much serious injury as that arising from health, safety, or environmental threats.

CIVIL PENALTIES IN FTC ENFORCEMENT ACTIONS AND THE FTC'S SMALL BUSINESS CIVIL PENALTY LENIENCY PROGRAM FY 2004

In accordance with Section 4 of SBPRA, this report covers the twelve-month period from October 1, 2003, through September 30, 2004, and describes the number of enforcement actions against entities, both small and large, in which the Commission recommended a civil penalty to the court, or, as in one case, the court ordered the defendants to pay a civil penalty without seeking a government recommendation; the number of enforcement actions in which the Commission reduced or waived civil penalties; and the total monetary amount of such civil penalty reductions or waivers.

SBPRA provides that each agency's report shall include definitions, selected at the discretion of the agency, of the terms "enforcement actions," "reduction or waiver," and "small entity." For purposes of the Commission's report, consistent with SBREFA, the term

“enforcement action” or “civil penalty enforcement action” will refer to actions in which the agency sought, or anticipated seeking, a civil penalty for violation of a statute or rule enforced by

penalty. Accordingly, the Commission has not included this case in its civil penalty reduction figures.

Thus, in enforcement actions against small entities, the Commission accepted a reduced civil penalty in one action, a total reduction of \$10,000. In enforcement actions against large entities, the Commission accepted a reduced civil penalty in 10 actions. The combined total of this reduction for the 10 actions was \$7,918,765. The Commission did not totally waive civil penalties in any of the 12 enforcement actions.

The total amount of civil penalties obtained by the Commission in the 12 cases was \$5,875,135. The total amount of reduction (for 10 cases involving large businesses and one case involving a small business) was \$7,928,765. The Commission did not waive all civil penalties in any of its small or large business enforcement actions. Accordingly, the grand total of reduced and waived civil penalties was \$7,928,765.

Small Business Reductions

In one enforcement action involving a small business, the Commission accepted the staff's recommendation to file a settlement requiring the payment of a civil penalty that was *reduced* from the initial civil penalty the staff sought by a total of \$10,000. In this instance, the small business settled FTC charges, filed in federal district court, alleging violation of a rule enforced by the Commission. The size of the company was the most significant factor considered by the FTC in determining how much to reduce the civil penalty. Applying the mitigating factors enunciated in its leniency policy and Section 5(m)(1)(C) of the FTC Act, the Commission reduced civil penalties sought in the case primarily because the small business was financially unable to pay the usual penalty, and the usual penalty would have impaired the small business's ability to do business or to compete effectively. The federal district court accepted the settlement without modifying the civil penalty amount agreed upon by the parties.

In a second, litigated enforcement action involving a small business, the federal district court ordered the defendants to pay a civil penalty of \$103,900. This amount was far less than the maximum civil penalty for which the defendants might have been liable, and the court did not afford the government an opportunity to recommend a civil penalty amount or any reduction in the civil penalty. Accordingly, the Commission has not included this case in its civil penalty reduction figures. The Commission did not waive all civil penalties in any of its small business enforcement actions.

Large Business Reductions

In 10 enforcement actions involving large businesses, the Commission accepted the staff's recommendations to file settlements requiring the payment of civil penalties that were reduced from the initial civil penalties the staff sought after staff considered all the circumstances of the case and applied relevant mitigating factors. The combined total amount of reduction in the 10 cases was \$7,918,765. In each instance, the large business settled FTC

charges, filed in federal district court, alleging violation of a statute or rule enforced by the

ENDNOTES

1. Pub. L. No. 107-198, 116 Stat. 729 (June 28, 2002), codified at 5 U.S.C. § 601 note (attached as Appendix A).
2. Pub. L. No. 104-121, 110 Stat. 857 (March 29, 1996), codified at 5 U.S.C. § 601 note.
3. In fiscal year 2004, the FTC was appropriated 1,063 FTE (full time equivalents).
4. The Commission may assess civil penalties of up to \$110 per violation of the Commission's Appliance Labeling Rule, 16 C.F.R. Part 305, pursuant to a provision of the Energy Policy and Conservation Act, 42 U.S.C. § 6303(a).
5. 62 Fed. Reg. 16809 (attached as Appendix B). The policy statements also are available on the Commission's website at <http://www.ftc.gov/os/1997/04/62fr16809.pdf>. Although the statements were drafted specifically with respect to small businesses, similar compliance assistance is available to larger businesses, and some comparable factors for determining civil penalty amounts may be relevant to larger businesses too. These policy statements provide guidance and information only, and do not create any rights, duties, obligations, or defenses, implied or otherwise. The Commission retains the discretion to determine how to proceed in particular cases.
6. Consistent with Section 223 of SBREFA, the Commission's small business leniency policy encompasses civil penalty actions brought by the Commission for violations of a statute or rule enforced by the Commission. Because the leniency policy is prescribed only for civil penalties for violations of a statutory or regulatory requirement, it does not apply to civil penalty actions under Section 5(l) of the FTC Act, 15 U.S.C. § 45(l), for violations of Commission orders (which are not actions to enforce a statutory or regulatory requirement), or to Commission cease and desist orders, federal court injunctions, affirmative requirements for fencing-in, or redress contained in Commission orders. In all cases, however, the agency considers individual circumstances that may affect the remedy to be sought in each particular case.
7. In 1996, the Commission issued a rule implementing the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134) by making inflation adjustments in the dollar amounts prescribed for each type of violation established by the statutory civil penalty provisions within the FTC's jurisdiction. *See* 61 Fed. Reg. 54548 (Oct. 21, 1996).
8. The criteria for assessing penalties for violations of the Appliance Labeling Rule are set forth in Part 1.97 of the Commission's Rules of Practice, 16 C.F.R. § 1.97.
9. Generally, transactions valued at \$50 million or higher are reportable under HSR.
10. Because of the statutory thresholds, few if any small businesses are subject to the premerger notification reporting requirements of the HSR Act.

11. Thus, like the Commission's 1998 report to Congress pursuant to SBREFA, this report excludes actions involving a penalty for violation of a prior Commission order. *See* n.6 *supra*.

12. For example, in many instances a firm may be liable both for civil penalties and for substantial restitution to injured consumers, and the Commission may focus on restitution and not penalties. The Commission also has an innovative program to increase compliance with its Funeral Industry Practices Rule by focusing on compliance training rather than civil penalties. Under this program, funeral providers may be offered an opportunity to make a voluntary payment to the U.S. Treasury or state Attorney General in an amount generally lower than would have been sought in a civil penalty action, and enroll in an industry-managed compliance program. The program includes a review of the firm's practices, compliance training, and follow-up testing and certification. Matters handled under this program have not been included in the report as civil penalty waiver cases. Although the Commission had authority to seek civil penalties, these are not matters in which the agency anticipated seeking civil penalties, and thus, for example, did not investigate the extent of the violations to estimate an appropriate penalty.

13. The FTC applies the size standards developed by the Small Business Administration to carry out the purposes of the Small Business Act. Those size standards can be found at 13 C.F.R. § 121.201. Depending on the type of industry, the size standard for small businesses generally is 500 or fewer employees for manufacturing, or \$6 million or less in receipts for retailing or service industries. Different figures apply in specific industries.